

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

IN RE:

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BLUE CROSS BLUE SHIELD ANTITRUST  
LITIGATION MDL 2406

\* 2:13-cv-20000-RDP

\* November 13, 2017  
10:00 a.m.

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Birmingham, Alabama

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**R E D A C T E D      T R A N S C R I P T**

TRANSCRIPT OF TELEPHONE CONFERENCE  
BEFORE THE HONORABLE R. DAVID PROCTOR  
UNITED STATES DISTRICT JUDGE

1 Present: Steve DiPrima  
2 (VIA TELEPHONE) Sam Leifer  
3 Chris Weller  
4 Glenn Kurtz  
5 Craig Hoover  
6 Dan Laytin  
7 Sarah Donnell  
8 Chris Kimble

9  
10 Also Present: Honorable T. Michael Putnam  
11 Ed Gentle

12 Court Reporter: Leah S. Turner  
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1                   This cause came to be heard and was heard on the  
2 13th day of November 2017, before the Honorable R. David  
3 Proctor, United States District Judge, holding court for  
United States District Court, Northern District of Alabama,  
Southern Division, in Birmingham, Alabama.

4                   Proceedings continued as follows:

5                   P R O C E E D I N G S

6                   THE COURT: Good morning. Who do I have on with me?

7                   MR. DiPRIMA: This is Steve DiPrima and Sam Leifer  
8 from Wachtell, Lipton, Rosen & Katz for Cigna.

9                   MR. WELLER: Chris Weller from Capell & Howard for  
10 Cigna.

11                   MR. KURTZ: Good morning, Your Honor. Glenn Kurtz  
12 from White & Case on behalf of Anthem.

13                   MR. HOOVER: Good morning, Your Honor. Craig Hoover  
14 for Anthem.

15                   MR. LAYTIN: Good morning, Judge. Dan Laytin and  
16 Sarah Donnell from Kirkland & Ellis for the Association.

17                   MR. KIMBLE: Chris Kimble for Anthem.

18                   THE COURT: Thank you. I think that's everybody,  
19 right?

20                   (UNIDENTIFIED MALE): I believe it is, Your Honor.

21                   THE COURT: I understand you all have hit a little  
22 bit of a log jam on my assignment I gave you. Why don't you  
23 give me a report on where we are up to the moment. And if you  
24 wouldn't mind, indicate your name before you speak so my court  
25 reporter can accurately record your remarks.

1 MR. KURTZ: Glenn Kurtz for Anthem. I will take the  
2 first crack at it. We have made quite a bit of effort leading  
3 up to the submission to come up with a joint chronology in  
4 accordance with Your Honor's wishes, and it's not that we have  
5 problems with a particular language or format or anything like  
6 that. We did have a fundamental disagreement with Cigna as to  
7 what was supposed to be included. We had understood that Your  
8 Honor wanted to evaluate potential violations of the mediation  
9 order or the agreement, and although the Court left it to Vice  
10 Chancellor Laster to deal with the specific request, Your  
11 Honor did make a number of remarks at the hearing as to what  
12 you considered to be covered by the mediation privilege which  
13 we took as guidance for the chronology exercise.

14 And so in accordance with that, we tried to identify  
15 potential disclosures of what happened in the mediation, and  
16 those are the documents that ultimately we logged in the  
17 submission that we provided to the plaintiffs, although even  
18 that, I should note, included some inadvertent litigation  
19 productions which may or may not have been part of what Your  
20 Honor would have wanted to view.

21 The version of the chronology that we then provided  
22 to Your Honor is much broader than the log. The reason for  
23 that is we were pretty concerned about maybe having a narrow  
24 interpretation of the order so we thought we would be over-  
25 inclusive, and in that regard we included a number of

1 documents relating to XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
2 XXX  
3 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
4 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
5 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
6 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

7 THE COURT: Hello? He dropped. We might have to  
8 have him call back in.

9 MR. KIMBLE: Yes, we should. We will send a note.

10 THE COURT: Thank you.

11 Chris?

12 MR. KIMBLE: Yes, Your Honor.

13 THE COURT: Do you have a separate line you can just  
14 call him and say hey -- that may be him. Mr. Kurtz?

15 MR. KURTZ: I apologize. Glenn Kurtz. I wondered  
16 what the long silence was when I was done. I apologize. I  
17 have no idea how we left the line.

18 THE COURT: Okay. Well, we were somewhere along the  
19 lines of you understood that you were supposed to reveal only  
20 discussions that occurred in the actual mediation or  
21 communications related to the actual mediation and what  
22 occurred in the mediation, I should say, not predictions or  
23 personal views, and about that time you left off.

24 MR. KURTZ: Okay. Thank you, Your Honor. So the  
25 last remarks I was making is: We thought we were, therefore,

1 over-inclusive. We did that because we were concerned that we  
2 didn't want to leave anything off that Your Honor might have  
3 wanted to see. But as broad as we were, we weren't broad  
4 enough for Cigna, and we took the position that the ADR order  
5 states the entire mediation process is confidential, so we had  
6 to include even the possibility of a mention of a mediation in  
7 the future. That's why their chronology includes things that  
8 predate the mediation by months, documents that mention the  
9 fact of mediation and administrative communications that talk  
10 about law firm conference room availability.

11 We thought that broad approach was a little  
12 inconsistent with Your Honor's remarks. We thought it was a  
13 lot inconsistent with Cigna's approach, in this court and in  
14 Delaware, and so we couldn't get to an agreement, not for a  
15 lack of trying; and, hence, you've got two chronologies.  
16 Maybe with some guidance as to who interpreted Your Honor  
17 correctly, we could go back to the drawing board.

18 But as I said at the outset, if we understand it  
19 correctly now, I think that the privilege log in affect, the  
20 redaction, that we supplied to the plaintiffs is probably the  
21 right body of documents.

22 THE COURT: All right. Let me hear from Cigna.

23 MR. DiPRIMA: Sure, Your Honor. So, our approach to  
24 this was basically to look at any document, any piece of  
25 testimony that touched on mediation, mentioned mediation, and

1 put it on the chronology for Your Honor. We didn't try to  
2 apply a filter of what was privileged or not privileged. We  
3 didn't get into whether something was someone's personal views  
4 or something else. On that it seemed to us and still seems to  
5 us that if a lawyer with instant knowledge of the mediation is  
6 expressing his personal views as to what is happening or  
7 likely to happen in the mediation, that that divulges the  
8 plaintiffs' position, the defendants' position, and that that  
9 was information that Your Honor would want to see or we assume  
10 so, and so we logged it on our chronology.

11 With regard to the log that went over to the  
12 plaintiffs, we prepared a log. We haven't supplied it yet to  
13 them. We weren't on the conference with the Court, I believe,  
14 the Friday before last, but for what it's worth, our view on  
15 the one that Anthem supplied is that it's incomplete. It  
16 omits, for example, the testimony from Anthem's 30(b) (6)  
17 witness to the DOJ, among other things. Also, it omits  
18 disclosures by Anthem's outside counsel in the case to the  
19 Maryland attorney general's office. And so on that, that's  
20 our view, but we will await for directions from the Court on  
21 how to proceed on that.

22 THE COURT: All right. And identify yourself,  
23 please, for the court reporter.

24 MR. DiPRIMA: I'm sorry, Your Honor. This is Steve  
25 DiPrima.

1                   THE COURT: That's what I thought, but I didn't want  
2 to speak for you.

3                   All right. Let me give you a couple of thoughts.  
4 First, anybody else want to weigh in on the issue before I  
5 provide some thoughts?

6                   Okay. A few thoughts. I am really concerned about  
7 conduct that could be violative of my order and Judge  
8 Phillips' mediation agreement. I don't think there's any way  
9 conduct that occurred before the mediation commenced could be  
10 so characterized, so Cigna's inclusion of all the information  
11 prior to the mediation is off the mark.

12                  What I'm interested in is actual disclosures about  
13 what occurred or was discussed in the mediation, and that  
14 would be all sources, even if some of those disclosures and  
15 sources duplicate each other. For completeness, I want all  
16 sources and what was said or done or communicated about the  
17 actual mediation meetings.

18                  I don't think at this point we're looking at any  
19 information about predictions or views on the mediation.  
20 There's nothing in my order or Judge Phillips' agreement that  
21 I can see that would prohibit anyone from saying this is what  
22 we hope to gain from the mediation or this is what we hope  
23 will occur in the mediation.

24                  So you're not required -- and for that same reason,  
25 we are not looking -- there's no requirement to disclose

1 discussions with other Blues in preparation for the mediation.  
2 And I think right at the end of our discussion at the last  
3 status conference, particularly if you go back and look at my  
4 discussion with Mr. Boies, I think he was -- and I agreed with  
5 him -- he was dead on that we're looking at conduct during the  
6 mediation, not strategy about the mediation, not discussions  
7 between the Blues about the mediation, but communications that  
8 Anthem made to others about what occurred in the mediation.

9 Now, I will say this. I think that in some ways the  
10 chronologies are over-inclusive; in some ways they are  
11 under-inclusive. For example, there was deposition testimony  
12 where -- I think it was Zelinsky testified about  
13 communications he had about what occurred in the mediation,  
14 and I don't see those anywhere in the chronology. I see a  
15 reference to the fact that he had the communication. I don't  
16 see anything in the chronology about Zelinsky telling me what  
17 he said. For example, that would be communications between  
18 Zelinsky and Nicole Jones, for example.

19 So I think you've got to go back to the drawing  
20 board and I think Cigna has to become less aggressive on what  
21 they're insisting get put in this, but to be honest with you I  
22 think Anthem is going to have to be more inclusive about what  
23 goes in it. And Cigna may not have all the information.  
24 Maybe Nicole Jones has information about what Zelinsky told  
25 her. That's not in here either. So the fact that Cigna is so

1       insistent that we get everything down, then I think you have  
2       to tell me what Nicole Jones' position was about what  
3       specifically Zelinsky told her about the mediation. Not  
4       predictions, not views, not goals, not hopes, dreams, or  
5       aspirations; but what occurred.

6               Similarly, it looks like there was communications  
7       between Anthem and some investigators. Those may be less  
8       problematic. I'm not making a judgment because there may have  
9       been some compulsion to reveal the information. I don't know.  
10       But there was also communications -- and I don't think I have  
11       the true substance of what those communications were -- about  
12       what occurred in the mediation. Any questions about anything  
13       I've said so far?

14               MR. KURTZ: Your Honor, Glenn Kurtz. Maybe a  
15       clarification or two. We will go back and look, but it may  
16       be -- I don't recall Tom Zelinsky's deposition having  
17       testimony about what he did or did not say to Nicole Jones.

18               THE COURT: It may not have. Look, it doesn't  
19       because I think you asserted a privilege there. You're  
20       missing my point. My point is he had the communication, and  
21       Anthem objected -- tell me if I'm wrong. Anthem objected in  
22       the deposition to him revealing what was discussed, right?

23               MR. KURTZ: Correct. Correct, Your Honor.

24               THE COURT: You're telling me what was discussed,  
25       though, as I assess whether or not it's privileged.

1 MR. KURTZ: Okay. I see.

2 THE COURT: You have left that out. You didn't  
3 include that in your chronology. That's exactly what I was  
4 trying to figure out.

5 So I think both sides have kind of missed the target  
6 of what I really want to know and gotten into these side  
7 scrimmages about things I don't care about.

8 MR. KURTZ: Understood, Your Honor. I have one  
9 other question.

10 THE COURT: Okay.

11 MR. KURTZ: We have a few entries that concern  
12 inadvertent productions by litigation e-counsel. So that  
13 would have been part of a 19 million page production and  
14 attorneys got some material out. We have had club act notices  
15 when we discovered it for the first time, frankly, when we  
16 noted it for the first time in connection with these  
17 exercises. That's something Your Honor wants to have included  
18 in the chronology?

19 MR. DiPRIMA: Just for a point of clarification,  
20 Your Honor, those are disclosures or productions to DOJ.

21 MR. LAYTIN: Your Honor, Dan Laytin for the  
22 Association. We would be happy to speak on that subject as  
23 well.

24 THE COURT: All right. Go ahead.

25 MR. LAYTIN: As Your Honor knows, we're operating in

1 the dark. We just got Anthem's paper about an hour ago. We  
2 haven't seen Cigna's. But with respect to the inadvertent  
3 production, my understanding is, you know, these are not  
4 affirmative disclosures by Anthem as part of any -- you know,  
5 trying to get the transaction through. This is simply among  
6 the millions and millions of documents that Anthem produced in  
7 somewhere, Delaware or D.C. These were inadvertently  
8 produced. And our view, as we understand Your Honor's point  
9 of view, is that these wouldn't be the kind of affirmatively  
10 disclosed communications.

11 THE COURT: Let me ask you this. Are you trying to  
12 get them back?

13 MR. LAYTIN: Absolutely. And when Anthem realized  
14 that -- and Glenn can speak to this -- Anthem clawed them back  
15 immediately.

16 MR. KURTZ: We did, Your Honor.

17 THE COURT: Let me ask you this. Do these documents  
18 reveal or reflect any communications that occurred about the  
19 mediation?

20 MR. DiPRIMA: Yes, Your Honor.

21 MR. LAYTIN: Your Honor, it would be at the time --  
22 for example, an email from my client's general counsel, the  
23 Association general's counsel, to various CEOs saying here is  
24 where we are, talking about the mediation, but that was only  
25 two other Blues. Anthem was a recipient to that email,

1 obviously, because its CEO received it, and that email just  
2 happened to be collected for the investigation or the  
3 challenge to the merger. I'm not sure which. And whatever  
4 filter Anthem applied missed that particular document, so it  
5 went out. But having realized that, they clawed that back.

6 MR. DiPRIMA: Your Honor, the document -- I'm sorry.

7 THE COURT: Go ahead.

8 MR. DiPRIMA: The documents at issue --

9 THE COURT: Wait a minute. Who are you?

10 MR. DiPRIMA: This is Steve DiPrima for Cigna. The  
11 documents at issue would have been produced in the DOJ  
12 litigation sometime before the trial in 2016. They were, as  
13 we understand it, clawed back after we alerted Anthem to them  
14 in the course of preparing the chronology, so a year later.  
15 At least one of them is heavily redacted for privilege. So  
16 the notion that it was an inadvertent production is -- well,  
17 that is the story with those documents.

18 THE COURT: Let me make sure I understand what we're  
19 dealing with here on these clawed back or attempted clawed  
20 back documents. There was a communication at some point in  
21 time about the mediation. Subsequent to that, there was an  
22 email which at least in part memorializes that communication  
23 about the mediation process?

24 MR. LAYTIN: Your Honor, it's Dan Laytin. One and  
25 two are one and the same. It's an email to a subset of the

1 board saying here is what we intend to do about the mediation,  
2 so the act is the memorialization.

3 THE COURT: Okay. I've got you. So there's nothing  
4 wrong with Anthem or others communicating with the board about  
5 what occurred in the mediation, so why is this even something  
6 I'm concerned about?

7 MR. LAYTIN: That's exactly our view, Your Honor.

8 MR. DiPRIMA: Because the document was produced to  
9 Cigna and to the regulators.

10 THE COURT: And then later was produced to Cigna and  
11 the DOJ as part of some regulatory investigation?

12 MR. DiPRIMA: As part of the litigation leading up  
13 to the -- correct.

14 THE COURT: Was that pre-litigation or  
15 post-litigation?

16 MR. DiPRIMA: Well, it would have been  
17 post-complaint.

18 THE COURT: Post-complaint, okay. Because what I  
19 understand is -- and maybe I'm off the mark. My understanding  
20 is DOJ came in and started asking some questions and then  
21 filed suit related to the merger.

22 MR. KURTZ: Glenn Kurtz. That's correct, Your  
23 Honor.

24 THE COURT: So if all of this, though, relates to an  
25 email that was simply in the Blue family, not to any third

1 party, about what occurred in the mediation, then clawback all  
2 you want, but I don't think that involves my inquiry about  
3 communications that occurred outside. I'm not really trying  
4 to dig into what got produced in litigation. I'm trying to  
5 figure out whether Anthem during the course of the mediation  
6 was violating the agreement that Judge Phillips had them sign  
7 and violating my order. If they produced something that was  
8 an internal email, whether that was a knowing disclosure,  
9 inadvertent disclosure, that's not really what I'm concerned  
10 about. That's in that litigation.

11 I'm worried about whether they were intentionally  
12 letting people know what was going on during the mediation  
13 after coming to me and complaining about you not clawing back  
14 these type of documents or allowing a clawback of these type  
15 of documents. Mr. DiPrima, do you understand that?

16 MR. DiPRIMA: I do, Your Honor.

17 THE COURT: So, remember the context of this. I get  
18 dragged in by at least Anthem and maybe other Blues trying to  
19 look over the Vice Chancellor's shoulder in the state  
20 litigation in Delaware about documents that are being produced  
21 related to the mediation. I am led to understand -- and maybe  
22 it was my misunderstanding, but I think the record will speak  
23 for itself -- that Cigna was trying to take advantage of  
24 production in the state litigation to get information about  
25 the mediation and that was unfair and there was a suggestion

1 that I weigh in and stop that practice. And we had a round of  
2 what I would say curative steps that I took because I was not  
3 very interested in issuing an all writs order and stepping on  
4 Vice Chancellor Laster's toes.

5 I also believed, based upon the feedback I had, that  
6 he was certainly cognizant of the fact that I had an MDL and  
7 needed to protect certain information and he was committed to  
8 doing that to the extent he could. So I thought we were  
9 having kind of informal efforts to resolve these issues rather  
10 than any formal issuance of a writ by this court.

11 In the midst of that, I find out, at least  
12 potentially, that Anthem has been disclosing information about  
13 the mediation on its own and for its own purposes outside of  
14 the litigation production in Delaware. That's what got my  
15 interest.

16 So what I'm mostly interested in this hearing is  
17 what Anthem disclosed and who they disclosed it to during the  
18 course of the mediation, not before the mediation, and I want  
19 to know what they disclosed about the actual mediation, not  
20 any predictions or hopes or dreams or aspirations about what  
21 they hoped might occur in the mediation. I want to know what  
22 was said.

23 So I think Cigna is overbroad in its approach, but I  
24 think, quite frankly, as I go through what you have presented  
25 to me, the two chronologies, there are several areas where I

1 think Anthem has not told me what was discussed. They have  
2 just told me that there was a discussion. And I noticed in  
3 the litigation, either the DOJ litigation or the Delaware  
4 litigation, several times where they instructed a witness not  
5 to answer the very question I'm asking now. That may be  
6 appropriate in that case. It's not appropriate here.

7 All right? So we are going to take another stab at  
8 the chronology with those instructions and I'm going to give  
9 you until next Friday to get it to me.

10 MR. KURTZ: Thank you, Your Honor. Glenn Kurtz. If  
11 I could just try to make sure. I want to make sure that  
12 there's no misunderstanding on the inadvertent production by  
13 e-counsel.

14 I understand what Your Honor said. I do want to be  
15 clear there are -- there's, for instance, an agenda, a  
16 tentative agenda, for a mediation. There's a communication  
17 with the mediator, and there is even a draft of a mediation  
18 statement. And so in some respects, they do relate to the  
19 mediation, but the issue I guess I was inquiring about is  
20 there was a 19 million page document production to the  
21 government in connection with their investigation and review  
22 of a 54 billion dollar merger and these documents got through  
23 inadvertently. It wasn't Anthem involved in the process. It  
24 would have been outside counsel that was involved in the  
25 process.

1                   Mr. DiPrima points out there's some redactions. I  
2 think those were spotted through some filter for  
3 attorney/client or work product, but the same filter  
4 apparently didn't work from outside e-counsel for mediation  
5 documents, and so we clawed them back. I don't know that --  
6 this doesn't seem to be what Your Honor was looking for to the  
7 extent -- looking for mistakes by outside counsel as much as  
8 something that sort of happened in connection with the merger.  
9 But I don't want to get it wrong either.

10                  THE COURT: Mr. Kurtz, let me ask you this. Do  
11 these documents reflect disclosures or communications about  
12 what occurred during the mediation process?

13                  MR. KURTZ: No, not -- I don't think they do unless  
14 they -- unless what they say got repeated at mediation because  
15 there would have been drafts of things before and I think it  
16 was all preparatory. It wasn't in the mediation.

17                  THE COURT: Well, if that's the case, why are we  
18 worrying about it, if it falls outside the definition I just  
19 gave you?

20                  MR. KURTZ: Okay. Great. I just wanted to --

21                  THE COURT: Now, Cigna may disagree with you. I  
22 think you guys can't agree whether the sun comes up in the  
23 East and sets in the West, at times.

24                  MR. DiPRIMA: Your Honor, to be clear, I believe  
25 those documents do reflect things that happened --

1                   THE COURT: You're proving my point. All right.

2 And that was Mr. DiPrima?

3                   MR. DiPRIMA: Yes.

4                   THE COURT: My point, though, is that if you have --  
5 let's just say this. If there's a dispute about documents,  
6 then you prepare a chronology that you agree to, and then you  
7 give me a second category of things that are disputed.

8                   Now, that's the best way I can do it because I just  
9 don't trust you all to come to an agreement about even the  
10 parameters I just laid out for you.

11                  MR. LAYTIN: Your Honor, it's Dan Laytin. Can we be  
12 provided access to those when they are prepared so that we can  
13 assess those as well?

14                  THE COURT: Yeah, so how are you going to assess  
15 them? What do you mean by "assess" them?

16                  MR. LAYTIN: I'm sorry?

17                  THE COURT: For example, Mr. Laytin, you said  
18 earlier that certain documents are privileged and therefore  
19 they shouldn't be produced. My point, though, is if there was  
20 a communication about the mediation, I think I'm entitled to  
21 know about that even if there's an assertion of privilege  
22 because all this is in camera at this point. It's not  
23 going to any other party. The privilege can be preserved.

24                  So, yes, you can know about it, you can continue to  
25 assert a privilege about it, but that doesn't preclude me from

1 getting it.

2 MR. LAYTIN: Yes. To be clear, Your Honor, I wasn't  
3 saying that as before it got to you. I'm just saying when  
4 it's provided to you, can counsel for Cigna and Anthem provide  
5 the same to us as well.

6 THE COURT: All right. But your letter --

7 MR. LAYTIN: And the other defendants -- privilege  
8 as well --

9 THE COURT: Your letter of October 23 was somewhat  
10 confusing to me, to Mr. DiPrima, because it seemed to be  
11 suggesting that if a document is privileged, you should not  
12 include it in the chronology, not that it should remain  
13 privileged despite being included in the chronology.

14 MR. LAYTIN: We did not object to -- as we  
15 understood Your Honor's directive, it was please tell me, the  
16 Court, what Anthem affirmatively disclosed to Cigna or anybody  
17 else about the mediation as Your Honor has defined the  
18 mediation to be capital M, to go back to our previous  
19 discussions. We have -- of course, we're not trying to get in  
20 the way at all of the disclosure of anything that falls within  
21 that set to Your Honor. We believe that Cigna was including  
22 documents on their chronology that were significantly far  
23 afield of that directive; and the substance of those  
24 communications if presented to Your Honor, the trial judge  
25 overseeing our case, could prejudice defendants.

1                   So that's how -- and we were trying to do this -- to  
2 say it was the 11th hour doesn't begin to describe the time  
3 left on the clock. So I'm sure that our letter was confusing  
4 and imprecise and I appreciate the opportunity to explain it  
5 to Your Honor because we were trying to just move with what we  
6 had and we had very limited information.

7                   So that's what we were trying to do there. I think  
8 that Your Honor describing the -- again, to the parties that  
9 what you're looking for in this chronology will hopefully  
10 prevent any gameplay like that with Your Honor on this next  
11 one, and so that helps. So all we're asking for is the  
12 ability to understand what's being disclosed to Your Honor of  
13 information that was confidential, joint defense privilege,  
14 that's now being provided to our trial judge. I know that the  
15 Association and I know that the other defendants would  
16 appreciate understanding the extent of that.

17                  THE COURT: I'm only receiving this information for  
18 assessment of whether my order was violated. I'm not reading  
19 anything into any negotiation strategy. I practiced law once,  
20 too. I realize all sorts of things go into the vetting  
21 process of how we're going to present our case to the  
22 mediator, how we're going to present our case to the other  
23 side, what we are going to give on, what we are going to take  
24 on, what we are going to feign on. I'm not looking at any of  
25 these issues as helping me on the merits to decide anything.

1                   All I'm interested in is seeing if, as was suggested  
2 at the status hearing, Anthem came in here seeking the  
3 protection of the Court to get back documents it claims was --  
4 that were inadvertently disclosed at the same time that they  
5 were knowingly violating the order and disclosing information  
6 about the mediation in violation of my order and in breach of  
7 Judge Phillips' mediation agreement. Make sense?

8                   MR. LAYTIN: Yes, sir.

9                   THE COURT: In other words, I am particularly  
10 interested in this because I felt like Anthem might have been  
11 playing me a little bit. At the same time that they were  
12 telling me how upset they were about Cigna's conduct in trying  
13 to wrench away these documents in the Delaware litigation and  
14 asking me to weigh in and tell Vice Chancellor Laster how to  
15 conduct his discovery process, they were at the same time all  
16 the way to their general counsel making improper  
17 disclosures -- and I'm not saying this happened, but this is  
18 my concern -- making improper disclosures about the very  
19 things they said Cigna was trying to discover, to Cigna.

20                   MR. KURTZ: Your Honor, Glenn Kurtz. I would like  
21 to make a remark or two, because I know Your Honor expressed  
22 that concern at the hearing in October as well. I do want to  
23 let you know that I'm representing Anthem in Delaware. We  
24 actually tried to get an agreement between Cigna and the  
25 Blues. Eventually we would have had to have gone to the

1 plaintiffs, maybe Your Honor and Judge Phillips as well at  
2 some point to try to find some common ground. We weren't  
3 trying to conceal any documents. We, in fact -- we're more  
4 than happy with the positions that we have had and our  
5 interests, and what we have said to Cigna in the past,  
6 predictions and the like, is consistent with our behavior. We  
7 didn't actually make a line of scope argument. The  
8 Association intervened in Delaware and raised the arguments as  
9 to scope. We're subject to agreements. We're trying to  
10 facilitate people as we can, but it's not our fight. We have  
11 been deferring really to the Association to protect what it  
12 thinks it needs to protect and what it thinks the scope is.  
13 We don't have a strong view on scope, and we haven't actually  
14 argued, I think, scope really to Your Honor as well. I think  
15 we tried to document the assurances that you were successful  
16 in obtaining from Cigna at the hearing and explaining why we  
17 thought our stipulation was what you were looking for.

18 But, frankly, from our standpoint, at least in  
19 Delaware, we saw a transcript, we saw some language from Your  
20 Honor that certainly made us concerned. Then we saw an order  
21 to show cause and at that point we certainly tried to protect  
22 our res that Your Honor was trying to protect and we wanted  
23 Your Honor to define it. But we haven't -- there is  
24 definitely not a leverage between Delaware and Alabama as far  
25 as we're concerned. Whatever the proper scope of privilege is

1 is exactly where -- we're happy to participate in discovery  
2 and we're not looking actually to conceal anything other than  
3 what is subject to your mediation and then facilitating  
4 mediation parties and making any arguments they want to make  
5 about how wide a scope that should be, but we haven't actually  
6 made an argument that that's a wide scope.

7 THE COURT: Well, let me give you a couple of  
8 examples of some areas that you want might want to focus on,  
9 Mr. Kurtz. In Shlagle's deposition in the DOJ litigation --  
10 am I pronouncing his name correctly?

11 MR. KURTZ: You are. You are, Your Honor.

12 THE COURT: It's referenced on page 10 of what I  
13 think is Cigna's summary or chronology.

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20 Well, first of all, Mr. Shlagle didn't listen to you  
21 when you told him don't volunteer information beyond the scope  
22 of the question, because he volunteered information beyond the  
23 scope of the question, and what he volunteered has my  
24 attention, XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
25 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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4 MR. KURTZ: I understand that, Your Honor.

5 THE COURT: That's prime example. I could give you  
6 others, but I don't think I need to, do I?

7 MR. KURTZ: No, you don't, Your Honor, and I get  
8 that. My only remarks were intended to communicate that we  
9 are not -- I understand this inquiry and what we're supposed  
10 to do with respect to mediation, and factually Shlagle was  
11 repeating what Tom Zelinsky told him, so it's sort of another  
12 source of whatever Tom Zelinsky said.

13 But I was just trying to be clear with Your Honor so  
14 you understood that we are not trying to use it as a shield  
15 and a sword. We know we have to deal with whatever  
16 disclosures have been made and I would be remiss in not  
17 communicating our regret that we have anything to deal with  
18 here and that we're taking so much of the Court's time on this  
19 exercise, but I do want to be clear we're not trying to  
20 overprotect on scope or anything else.

21 We have been trying to facilitate an agreement so  
22 that everybody gets what they want subject only to what's  
23 properly protected by mediation. We don't want to be  
24 over-aggressive in the invocation of that privilege. We just  
25 don't want to be under-aggressive given Your Honor's order to

1 show cause.

2 So we're not playing the cases against each other.  
3 We have some disclosures that happened under common interest  
4 in connection with the merger that we have to deal with.  
5 We're taking it very seriously and we apologize, but we  
6 definitely aren't gaming this.

7 THE COURT: Okay. Is Friday enough time for  
8 everybody to complete the mission?

9 MR. KURTZ: Absolutely.

10 MR. LAYTIN: And, Your Honor, can Cigna and Anthem  
11 provide the joint and unjoint chronologies to the defendants  
12 as well?

13 THE COURT: Any objection to that?

14 MR. KURTZ: Glenn Kurtz. We don't have an  
15 objection. We don't even have an objection to including the  
16 Association in the exercise if it's another set of opinions  
17 that could help us get us to the right spot.

18 THE COURT: I will leave that up to you all.

19 MR. DiPRIMA: I think that's going to slow things  
20 down.

21 THE COURT: Is that Mr. DiPrima?

22 MR. DiPRIMA: Yes, Your Honor.

23 THE COURT: You think that might slow things down to  
24 include the Association?

25 MR. DiPRIMA: I do.

1                   THE COURT: Well, if things slow down and still get  
2 done by Friday, that's okay, Friday of next week.

3                   MR. KURTZ: That's plenty of time. Thank you, Your  
4 Honor.

5                   THE COURT: Wait a minute. Is Friday of next week  
6 Thanksgiving Friday?

7                   MR. KURTZ: It is.

8                   THE COURT: How about the following Monday, then.  
9 I'm not going to expect anybody to be in the office on Friday  
10 sending out -- so we will say Monday the 27th by 4 p.m.  
11 Central time.

12                  MR. KURTZ: Thank you very much, Your Honor.

13                  THE COURT: Sorry. I got excited and forgot next  
14 week is Thanksgiving.

15                  MR. KURTZ: We were aware of it, but we thought we  
16 would get it done for you anyway.

17                  THE COURT: I will probably enjoy the Iron Bowl  
18 without thinking about you all until the following Monday  
19 anyway.

20                  All right. What else do we need to take up for now?

21                  UNIDENTIFIED MALE: You might want to explain to  
22 those Yankees, Your Honor, what the Iron Bowl is.

23                  THE COURT: Alabama/Auburn.

24                  MR. KURTZ: We are aware of football.

25                  Thank you very much Your Honor. We appreciate all

1 the guidance and we will do our best to get something that's  
2 joint and then have it filed for you on that Monday.

3 THE COURT: All right. Sounds good. Take care.

4 (End of proceedings.)

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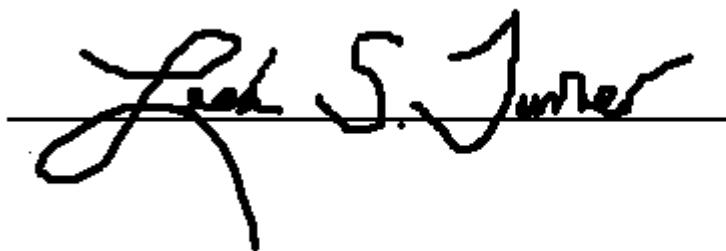
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C E R T I F I C A T I O N

I hereby certify that the foregoing transcript in the above-styled cause is true and accurate.

A handwritten signature in black ink, appearing to read "Leah S. Turner", is written over a horizontal line.

**Leah S. Turner, RMR, CRR  
Federal Official Court Reporter**